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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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July 1974

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

Page

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JURISDICTIONAL STATEMENT

The appellants, Aberdeen & Rockfish Railroad Company, *et al.*, ("the railroads") which are listed at pp. 2a-13a below, appeal from an order and decision of a three-judge District Court sitting in the District of Columbia which vacated orders of the Interstate Commerce Commission relating to railroad rate increases and remanded the case to the Commission for further proceedings.

OPINIONS BELOW

The opinion of Judge Wright and the dissenting opinion of Judge Flannery, which are reprinted at Appendix A of the Government's jurisdictional statement,[1] are reported at 371 F.Supp. 1291. The ICC's report in *Ex Parte No. 281* served on October 4, 1972, which is reprinted in pertinent part at Gov. J.S. App. D, is reported at 341 I.C.C. 290; the ICC's order served on May 7, 1973, which is reprinted at Gov. J.S. App. E, is unreported; and the ICC's final environmental impact statement is reported at 346 I.C.C. 88.[2]

JURISDICTION

This suit was initiated by appellee SCRAP in the District Court in May 1972, pursuant to 28 U.S.C. §§ 1336, 2321-25, to enjoin orders of the ICC. The decision and order of the District Court at issue in this appeal, which are reprinted respectively at Gov. J.S. App. A and App. D, were entered on February 19, 1974. On April 19, 1974, appellants Aberdeen and Rockfish Railroad Company, *et al.*, filed in the District Court a notice of appeal to this Court, which is reprinted at p. 1a below, and on June 13, 1974, Mr. Chief Justice Burger extended the time to docket the appeal to and including July 2, 1974. Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1253. See *Baltimore & O.R.R.* v. *United States,* 386 U.S. 372 (1967).

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[1] The United States and the Interstate Commerce Commission have appealed from the same order and decision that is the subject of this jurisdictional statement. Their jurisdictional statement is hereafter cited as "Gov. J.S."

[2] We are advised that the Government is furnishing to the Court separate copies of the October 4 report and the final environmental impact statement.

STATUTE INVOLVED

The statutory provision pertinent to this appeal is Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), which reads in pertinent part as follows:

"The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

* * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be

made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes. . . ."

QUESTIONS PRESENTED

In November 1972 the Interstate Commerce Commission suspended general rate increases filed by the railroads on virtually all interstate freight traffic so far as the increases applied to recyclable commodities. The ICC then prepared a draft environmental impact statement, received comments upon it, and shortly before the end of the suspension period issued a final impact statement concluding that the increases would have no significant adverse effect on the quality of the human environment. In the decision here under review, the District Court vacated the ICC's orders respecting the rate increases on recyclable commodities on the ground that the impact statement was inadequate. The questions presented are:

1. Does the District Court have jurisdiction to review general revenue orders issued by the Commission which did not determine the justness and reasonableness of any particular rates but merely terminated suspensions of carrier-made rates shortly before the conclusion of the maximum statutory suspension period?

2. Does the National Environmental Policy Act contemplate that courts will review the substantive determinations made by agencies in their environmental impact statements and, assuming *arguendo* that such review is permitted, does the District Court have any adequate basis for setting aside the ICC's

extensive and detailed environmental impact statement in this case or any authority to prescribe on remand what evidence, arguments and procedures may or may not be adopted by the agency?

3. Where the sole and exclusive decision in a general revenue proceeding is reached by the Commission itself, does NEPA require that the agency not only accompany its decision with an environmental impact statement but also that the impact statement be prepared before the Commission even commences the collection and sifting of evidence?

STATEMENT OF THE CASE

In *United States* v. *SCRAP*, 412 U.S. 669 (1973), this Court reviewed and reversed an injunction issued in July 1972 by the District Court for the District of Columbia prohibiting the railroads from collecting a 2.5 percent temporary emergency surcharge so far as it applied to recyclable commodities. While that case was pending in this Court, the ICC completed proceedings relating to general increases on freight rates, varying from commodity to commodity but averaging about 4 percent, which were designed to replace the temporary emergency surcharge. In June 1973, the District Court preliminarily enjoined the general increases so far as they applied to recyclable commodities. Mr. Chief Justice Burger granted a stay of the injunction, and this Court denied an application to vacate the stay. 413 U.S. 917 (1973).

In November 1973, this Court vacated the District Court's preliminary injunction and remanded for further consideration in light of *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). 414 U.S. 1035-36 (1973). In the meantime, the appellees moved

in the District Court for a permanent injunction and declaratory relief. In February 1974, the District Court, with Judge Flannery dissenting, vacated the Commission's orders which sanctioned railroad rate increases on recyclables and remanded the case for further proceedings. 371 F. Supp. 1291. It is this order and decision which are the subject of the present appeal.

A. Background Facts.[3] In March 1972, not long after the railroads introduced a 2.5 percent temporary emergency surcharge on nearly all freight rates, they filed tariffs providing for permanent increases on almost all commodities. These increases, averaging about 4 percent, were intended to supersede the flat surcharge. On April 24, 1972, shortly before the new increases were to become effective, the Commission suspended the increases for the full seven-month period permitted by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to and including November 30, 1972, and proceeded to investigate them.

The Commission accepted written evidentiary submissions, permitted cross-examination of witnesses, and in June 1972 heard oral argument. On October 4, 1972, it served a lengthy report directed to the permanent increases. 341 I.C.C. 290. The report, almost 300 pages long, examined in detail the railroads' revenue needs, environmental considerations, and the application of the proposed increases to a large number of commodity groups comprising a vast number of indi-

[3] Certain of these facts were discussed in the railroads' brief in this Court in the *SCRAP* case and there is a brief summary of them contained in that decision. 412 U.S. at 683 n. 11. They are restated in this jurisdictional statement for the convenience of the Court.

vidual commodities. The Commission determined to allow the increases to go into effect before the end of the suspension period, provided that the railroads established certain limits on certain of the increases, but the Commission did not definitively determine the lawfulness of any individual rates on particular movements. 341 I.C.C. at 528-30.

The October 4 report confirmed the railroads' critical need for increased revenue. It showed that the proposed increases, even if made fully effective, would cover only about one-fourth of the $1.6 billion increase in costs which the railroads had suffered between the last general rate increase and April 1972; and the computation did not reflect additional cost increases, exceeding three-quarters of a billion dollars annually, scheduled to become effective between April 1972 and April 1973, largely as a result of new wage and tax increases.[4] The report also considered other indices of financial condition such as working capital, equipment obligations, cash flow, and rate of return. *Id.* at 303-08. For example, it found that net working capital, a key index of financial condition, had continued to decline steadily and had now approached or reached a *deficit* figure, depending on the region and method of computation. *Id.* at 304.

The report extensively discussed environmental considerations, including the limited role played by rate levels as compared with service factors and the rail-

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[4] 341 I.C.C. at 297-303; affidavit of William F. Betts, Dec, 12, 1972, para. 5, submitted to the court below. The railroads have since estimated that the increases represent approximately $350 million annually, including $340 million on nonrecyclables and $10 million on recyclables. Betts aff'd, para. 6.

roads' own incentive not to apply the increases where this could result in loss of traffic. 341 I.C.C. at 322-25. It also examined the application of the increases to specific groups of recyclable commodities such as iron and steel scrap, paper scrap, textile waste, and others. *Id.* at 358-69, 392-413. It concluded that the increase would have no significant adverse effect on the quality of the environment, and for this reason the Commission did not prepare a formal environmental impact statement.[5]

The increases on nonrecyclables became effective on October 23, 1972, but the Commission's report continued the suspension on recyclables in order to receive further comments. 341 I.C.C. at 571. A number of interested parties including the Council on Environmental Quality ("CEQ") and the Environmental Protection Agency ("EPA") urged the ICC to prepare a full environmental impact statement on the recyclables despite the report's conclusion that there would be no adverse environmental impact. On November 7, 1972, the Commission entered an order suspending the selective increases on recyclables for the statutory seven-month period to and including June 10, 1973, and it reopened the proceeding to consider further the environmental issues.[6]

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[5] Under the National Environmental Policy Act ("NEPA"), Section 102(2)(C), 42 U.S.C. § 4332(2)(C), it is only where such a significant impact will occur that an agency is required to prepare an environmental impact statement. Although the District Court in its July 1972 decision said that a bare finding of no impact by the agency would not satisfy this requirement, it stated that the case might appear differently "if the record revealed a detailed study by the Commission at the conclusion of which it found no significant environmental impact and, hence, no need for an impact statement." 346 F. Supp. at 201 n.17.

[6] What the Commission suspended was the portion of the new tariff filed by the railroads in October 1972, following the October

On the same day that the Commission entered this order, SCRAP filed papers in the District Court seeking to enjoin the increases both on recyclable and nonrecyclable commodities. On January 9, 1973, the District Court denied the requested injunction. *SCRAP* v. *United States,* 353 F. Supp. 317 (D.D.C. 1973). It held that no injunction was required with respect to the increases on recyclables since those increases had been suspended. As for the nonrecyclables, the court gave a number of reasons for denying injunctive relief: these included "the obvious fact that it is in their [the railroads'] own self interest to request and implement rate increases only where there is no reasonable prospect of diversion to other means of transport" (*id.* at 323) and "the substantial and irreparable harm to the nation's railroads that such relief would cause." *Id.* at 323-24.[7]

B. The Environmental Impact Statement. Shortly after reopening the investigation in November 1972, the ICC moved to supplement the already extensive body of information concerning environmental issues that had been reflected in its October 4 report. In December 1972, it published a 32-page bibliography of articles and

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4 report, so far as the tariff provided for general increases on recyclables effective November 12, 1972. Since these were largely the same rates that had been suspended in April 1972, it is questionable whether the Commission had power unilaterally to suspend the rates for an additional seven months. However, the railroads, as they have in other instances, consented to the further suspension in this case.

[7] The railroads had filed extensive affidavits to show that an injunction against the general increases on nonrecyclables would have a catastrophic effect on the railroad industry; these affidavits showed that the revenues involved were critical not only to maintain adequate transportation service in the country but also to fund the railroads' own increasingly extensive environmental programs.

studies concerning recycling and related matters and it requested that interested parties supplement this list of relevant materials.[8] A number of different parties did file responsive statements and the Commission's notice stated that a further opportunity for comment would be provided after release of a draft environmental impact statement.

The Commission issued its draft impact statement on March 5, 1973. A number of parties submitted comments including CEQ and EPA. The comments of SCRAP, the appellee Environmental Defense Fund ("EDF"), and EPA were critical; those of CEQ were somewhat more measured and concluded: "Once again, we commend the Commission for its efforts in assembling this statement and hope that the deficiencies identified by commenting parties will be carefully considered in preparing the final statement and in evaluating and selecting among possible alternative actions." Letter from Russell Train to Chairman Stafford, April 17, 1973, p. 3.

After reviewing comments from interested persons, the Commission on May 7, 1973, served its final environmental impact statement relating to the selective increases on recyclable commodities. 346 I.C.C. 88.[9] It concluded that the increases in question would *not* have a significant adverse effect on the environment and it also concluded that any unanticipated environmental costs which might result were outweighed by the eco-

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[8] A copy of the bibliography is attached as Appendix A to the final environmental impact statement which is discussed below.

[9] A Commission order incorporating the impact statement and discontinuing the proceeding accompanied the impact statement. See Gov. J. S. App. E.

nomic benefits derived from the sound rail transportation service which would be fostered by the additional revenues. *Id.* at 236-37. It based this conclusion upon 150 pages of discussion, followed by nearly 40 pages of appendix materials.

The impact statement examined the nature of the railroad rate structure and related allegations that the existing structure discriminates against recyclable commodities. *Id.* at 102-33. It considered whether the increases would divert traffic from rail to truck to the detriment of the environment. *Id.* at 136-43. It reviewed claims that the increases would deter the movement of recyclables, first considering recyclables as a class and then examining particular major categories of recyclable commodities. The statement discussed separately iron and steel scrap (*id.* at 148-60); paper scrap (*id.* at 160-76); textile wastes (*id.* at 177-82); petroleum refining waste and waste sulfides (*id.* at 182-85); scrap glass (*id.* at 186-95); nonferrous metal scrap (*id.* at 196-01); plastic scrap (*id.* at 202-09); and fly ash and other industrial ashes (*id.* at 209-15).

A major share of the discussion of particular commodities was devoted to iron and steel scrap since it constitutes by far the largest category of recyclable materials shipped by rail.[10] The ICC discussed *inter alia* the nature of the steel-making industry, steel technology, and the scrap industry structure and its tech-

[10] Based on transportation revenues, iron and steel scrap represents approximately 50 percent of the rail shipments of recyclables or as much as all other categories together. Iron and steel scrap is significant in another respect: rail transportation of this scrap is concentrated in the northeastern United States, financially the most seriously stricken of the three transportation districts.

nology; demand and pricing patterns for iron and steel scrap which, as was true of recyclables generally, revealed no evidence "that secondary commodities either are being diverted to other modes of transportation or are not moving as a result of past rail freight rate increases" (346 I.C.C. at 145); the comparative rail freight costs to shippers of moving scrap and of moving raw materials needed to produce the same amount of iron and steel; and the existing rate *advantage* scrap enjoys vis-a-vis raw materials, an advantage which will be increased by the rate increases in question. *Id.* at 145-47, 148-60.[11]

In addition, the Commission considered the adverse effects of *not* having the increases in question. It stated that "the railroads require these increases to continue to operate in an economic and efficient manner. Failure to approve these increases would endanger the continued existence of the railroads, and, accordingly, would have a far greater potential adverse effect upon the quality of our environment than any minor diversion from rail carriage that may occur now." *Id.* at 217. The ICC also considered alternatives to the proposed rate increases including the further extension of multi-

[11] The Commission found (*id.* at 159) that "the shipping cost per ton of [iron and steel] scrap without the *Ex Parte No. 281* rate increase is $5.58, while the total transportation cost of the equivalent amount of raw materials is $8.49. With the present rate structure, it costs $2.91 less to ship scrap than the comparable raw materials. With the implementation of *Ex Parte No. 281*, the average cost of transporting 1 ton of scrap will be $5.83, and the cost of transporting the comparable raw materials $8.87. Thus, shippers would need to pay $3.04 more to transport raw materials than the corresponding amount of scrap. . . . The difference in transportation costs of raw materials and scrap will increase with *Ex Parte No. 281*, favoring scrap by an additional 13 to 16 cents."

ple-car rates on scrap, hold-downs of increases on recyclable commodities, subsidies to carriers and similar alternatives. *Id.* at 218-35.

C. The District Court's Preliminary Injunction. The final impact statement was served by the Commission on May 7, 1973, but no immediate action was taken by either SCRAP or EDF. Then, on May 30, eight days before the impact statement became effective, those two organizations filed a short motion in the District Court for a preliminary injunction against the new increases on recyclables which the railroads intended to make effective at the end of the suspension period on June 10, 1973. On June 7, 1973, the day the Commission had contemplated that its final impact statement would become effective, the District Court preliminarily enjoined the Commission and the railroads from collecting the proposed increases on recyclables "until further order of this court." Order of June 7, 1973. The four-paragraph injunctive order contained conclusory assertions that the appellees had made a sufficient showing of likelihood of success and that without relief irreparable injury would occur through unnecessary extraction of raw materials. The order also stated, inaccurately and without explanation, that injunctive relief "will not substantially harm the railroads." *Id.*[12]

On June 8, 1973, the railroads filed an application in this Court for a stay of the District Court's order. Following submission of oppositions, Mr. Chief

[12] The general increases on recyclables in fact represent approximately $10 million per year in increased revenues. Affidavit of William F. Betts, June 6, 1973, para. 2, submitted in this Court in connection with the railroads' application for a stay of the District Court's preliminary injunction of June 7, 1973.

Justice Burger granted a stay of the injunction.[13] Thereafter, the increases on recyclables were placed in effect and continue in effect today.[14] On November 19, 1973, this Court for the second time in the course of this litigation overturned the judgment of the District Court, and it remanded the case for further consideration in light of *Atchison, T.&S.F.Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973). 414 U.S. 1035-36.

D. Present Proceedings. While the appeal of the District Court's preliminary injunction was pending before this Court, the appellees filed motions for summary judgment in the District Court.[15] These parties sought two principal forms of relief: first, a declaration that the ICC's environmental impact statement in *Ex Parte No. 281* was inadequate and unlawful, and an order requiring the ICC to revise its environmental impact statement in accordance with what appellees deemed to be the requirements of NEPA; and second, permanent injunctive relief forbidding the railroads from collecting the permanent rate increases on recyclables which were the subject of *Ex Parte No. 281* or from

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[13] SCRAP, EDF, and one of the trade associations subsequently filed applications with the full Court to vacate the stay issued by the Chief Justice. On June 25, 1973, this Court denied the application to vacate the stay. 413 U.S. 917.

[14] The increases became effective on June 10, 1973. They were subsequently discontinued as the result of the President's price-freeze order. When the freeze terminated, the increases were reinstituted.

[15] In addition to SCRAP, which filed a motion for summary judgment below, the following intervenors also filed such motions: the EDF and two associated organizations, the National Parks and Conservation Association and Izaak Walton League of America; the National Association of Recycling Industries, Inc., ("NARI") and three of its members; and the Institute of Scrap Iron and Steel, Inc. ("ISIS") and one of its members.

collecting any further rate increases on recyclables obtained in any subsequent proceeding unless and until the ICC complied with what appellees claimed to be the requirements of NEPA.

In response, the railroads filed a memorandum and numerous supporting affidavits.[16] The affidavits established the substantial and irreparable losses totalling $10 million per year that an injunction against rate increases on recyclables would cause the railroad industry; the readily identifiable cost increases, greatly in excess of additional revenues, the railroads continue to suffer;[17] and the extremely serious condition of the railroad industry as a whole.[18] The affidavits also demonstrated that any significant reduction in the railroads' revenues would, in light of their financial state, be trans-

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[16] Included among these were an affidavit from Mr. Betts, Vice President for Economics and Finance of the Association of American Railroads; affidavits from railroad experts in the transportation of ferrous scrap and nonferrous metal scrap, paper scrap and textile waste, rubber scrap, plastic scrap and chemical wastes, and glass scrap; affidavits from two major steel companies, Bethelehem and National; and affidavits of seventeen individual railroads.

[17] Increased costs incurred since the last general revenue proceeding represent $2.2 billion on an annual basis reckoned through April 1973 and over $2.7 billion through February 1974. Betts aff'd, para. 4. By contrast, rate increases obtained since the start of *Ex Parte No. 281* provide only $650 million on an annual basis, including the increases on recyclables here at issue, representing only about 30 percent of the readily identifiable cost increases incurred through September 1973. Betts aff'd, paras. 4-6.

[18] The serious financial plight of the railroads was confirmed by virtually all of the railroad affidavits. See, *e.g.*, Central of New Jersey aff'd, paras. 2-5; Rock Island aff'd, pp. 2-3. In several cases, including the Penn-Central and Reading, railroads currently in reorganization were now confronted with serious shortages of cash necessary simply to maintain operations.

lated directly into poorer service for the public.[19] Furthermore, the affidavits showed that an injunction would have had an immediate and adverse impact on the environment as well as rail transportation service generally.[20] In addition, the affidavits revealed that the increases here at issue will not discourage the movement of recyclable commodities by rail or result in their diversion to trucks.[21] Finally, the affidavits demonstrated

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[19] The affidavits showed, for example, that the loss of the $10 million in annual revenues here in question would mean that maintenance must be reduced, new cars cannot be financed, and the railroads' physical plant including track must be allowed to deteriorate even further, causing still more serious transportation problems in the future. *E.g.*, Burlington Northern aff'd, paras. 5, 16; Milwaukee aff'd, para. 16.

[20] Reduced service, decreased car supply, and deteriorating plant impair the railroads' ability to transport all commodities (*e.g.*, Lehigh Valley aff'd, para. 5; MKT aff'd, p. 4), and bear with particular force on recyclable materials because many of them cannot feasibly be moved unless they are moved by rail. See, *e.g.*, Betts aff'd, para. 9. In addition, the railroads' own environmental programs, which now cost approximately $100 million per year to maintain at their current level, would be adversely affected by the injunction (Betts aff'd, para. 10), including major expenditures for diesel emission control; roadside fire control; weed and brush control; pollution control at maintenance shops; separation of oil from drainage; and elimination of stationary stack emissions. See, *e.g.*, Illinois Central Gulf aff'd, p. 7; Southern Pacific aff'd, p. 4, paras. 17-18.

[21] This is established by the railroads' own past experience, (*e.g.*, Southern aff'd, pp. 4-5); their experience with the increases involved in this case (*e.g.*, Reading aff'd, para. 7); and experts familiar with individual commodities. See note 16, above. Notably, a graph comparing rail rate increases on ferrous scrap during the past five years and figures showing the actual tonnage of such scrap moved by the Penn Central in this period vividly demonstrates that there is *no correlation* whatever between the two. See Scanlan aff'd, ex 1. Two major ferrous scrap *purchasers*—Bethelehem Steel Corporation and National Steel Corporation—filed affidavits which affirm that the rail rates do not

that rail rate charges are carefully calculated to avoid increases which would risk a loss of traffic and thereby defeat the purpose of the increases.[22]

On February 19, 1974, the District Court, with Judge Flannery in dissent, vacated the Commission's order sanctioning the rate increases on recyclable commodities and remanded the case to the Commission for further proceedings with respect to the environmental issues involved. 371 F. Supp. 1291. The court refrained, however, in light of this Court's decision in *Wichita Board of Trade,* from enjoining the railroads from collecting the increased rates on recyclables pending the Commission's reconsideration. The United States, the Commission, and the railroads have appealed from the District Court's order and decision.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The present appeal raises fundamental questions concerning the jurisdiction of a statutory three-judge court convened to review ICC orders. Under a long-standing line of decisions, the ICC's general revenue orders assailed in this case have never been deemed reviewable orders, and this Court's decision in *SCRAP* confirms

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affect the amount of ferrous scrap purchased by them because the amount of scrap purchased depends directly on the demand for steel. Cressman aff'd; Webster aff'd.

[22] See, *e.g.*, N&W aff'd, para. 5. The increases here involved were in fact quite modest both in comparison with past increases (see Southern aff'd, p. 5) and in comparison with the value of the commodities. Where general increases may threaten to discourage or divert traffic because of local circumstances, the railroads meet the problem by applying individual hold-downs limiting or rendering inapplicable rate increases for particular movements. See, *e.g.*, Lehigh Valley aff'd, para. 6.

that NEPA has not altered these jurisdictional limitations. Since general revenue proceedings occur frequently and often involve hundreds of millions of dollars, the District Court's refusal to follow these decisions presents an important and recurring question.

Serious questions relating to the requirements of NEPA and the standards for judicial review are also raised by the lower court's invalidation of the ICC's exhaustive impact statement. Contrary to sound authority, the lower court in evaluating the statement substituted its judgment for that of the expert agency. In addition, it established requirements for impact statements that have no basis whatever in the governing statute and would seriously impair the ICC's ability to maintain a sound railroad system in the United States.

1. A substantial question is presented whether the lower court had authority to act in this case. As its opinion in this case plainly shows (see 371 F. Supp. at 1310) the court's decision was directed specifically against two orders of the ICC entered in a general revenue proceeding and a related environmental impact statement: one order implemented the Commission's report of October 4, 1972, and the other order, served on May 7, 1973, adopted the final impact statement and terminated the reopened proceeding. The lower court's authority to review the impact statement depends, of course, on its authority to review the ICC orders themselves.[23]

[23] The lower court is a statutory three-judge court empowered to review ICC "orders" (28 U.S.C. §§ 1336(a), 2321-25), and the decision below explicitly recognized that the District Court's authority to review the ICC orders presented a threshold jurisdictional problem. 371 F. Supp. at 1296-98.

Each of these orders reviewed by the lower court terminated the suspension of the rates shortly in advance of the end of the seven-month period, and, if neither order had been issued, the rates would still have become effective by operation of law at the end of the period. In neither order did the ICC make any finding that the particular rates at issue were just and reasonable, and neither of them cut off the rights of any interested party to file a complaint with the Commission to establish that particular rates are unlawful. Instead, the ICC's determinations were typical of general revenue proceedings, for they represented only initial judgments about broad rate categories based principally upon an appraisal of railroad revenue needs.[24] Because they do not foreclose shipper remedies or determine finally the lawfulness of any individual rate, the general revenue orders are comparable to suspension orders directed to particular rates, and their basic function—as this case demonstrates—is to fix the duration of a suspension involving numerous rates.[25]

For almost 40 years it has been the settled rule in the lower courts that general revenue orders, like suspension orders directed to individual rates, are not review-

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[24] See *United States* v. *SCRAP, supra,* 412 U.S. at 692 n. 16; *New England Divisions Case,* 261 U.S. 184, 196-197 (1923); *United States* v. *Louisiana,* 290 U.S. 70, 76-77 (1933).

[25] The present case is thus quite unlike *Wichita* where the Commission had held definitively that the particular rates there at issue were just and reasonable. In fact, this Court in *Wichita* contrasted the order there involved with general revenue orders, observing that if the grain charge "were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order." 412 U.S. at 814 n. 10.

able.[26] The rule, as the cases disclose, is based upon sound policy considerations including an unwillingness of courts to interfere at what is merely an intermediate stage in the rate-making process, the availability of further remedies focusing upon individual rates, and the dangers of disruption and inconsistency that would result from review of general revenue orders. Most recently this Court left standing two such lower court decisions in the *Atlantic City* and *Alabama Power* cases cited in the margin (note 26); in both cases this Court divided evenly on the question whether the Commission's findings relating to carrier revenue needs were subject to review in the context of general revenue orders.[27]

More importantly, in the same Term that *Atlantic City* and *Alabama Power* were decided, this Court unanimously *affirmed per curiam* the decision of the District Court in *Electronic Industries Ass'n* v. *United States, supra* (see note 26). In that case, the attack was directed not to revenue-need findings but to

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[26] See, *e.g.*, *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935); *Koppers Co.* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (M.D. Fla. 1956), *aff'd mem.*, 352 U.S. 1021 (1957); *Atlantic City Elec. Co.* v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co.* v. *United States*, 316 F.Supp. 337 (D.D.C. 1970); *both aff'd by an equally divided Court*, 400 U.S. 73 (1970); *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970), *aff'd per curiam*, 401 U.S. 967 (1971).

[27] *Alabama Power* clearly involved an attack on revenue-need findings. In *Atlantic City*, the gravamen of the complaint was less certain, but the United States urged that the case be considered by this Court on the same basis as *Alabama Power*.

the application of the general increase to particular categories of rates. Similarly, the basic thrust of the appellees' claims here concerns the Commission's treatment of particular categories of rates applicable to recyclable commodities, and accordingly the reviewability question is governed directly by this Court's decision in *Electronic Industries.*

While the lower court disagreed with this Court's decisions in the cases discussed above (371 F. Supp. at 1296), it principally contended that "*the existence of NEPA* requires us to reconsider the application of these doctrines and *in NEPA cases* to accept more of the broad jurisdictional authority granted us." *Id.* at 1298 (emphasis added). But this Court's opinion in *SCRAP* shows by clear analogy that the involvement of NEPA and the assertion of environmental claims do not alter pre-existing jurisdictional rules. *SCRAP* emphasized that nothing in NEPA or its legislative history reflected any congressional intent to alter the rule that courts may not "suspend" rates by injunction when the Commission has chosen not to do so or when the statutory suspension period has expired. Similarly, nothing in NEPA or its legislative history bespeaks any intention to overturn the settled rule against judicial review either of suspension orders directed to individual rates or of general revenue orders directed to rates as a whole.

It is unnecessary to belabor the importance of this jurisdictional question. In view of prior decisions, it presents a serious legal issue; indeed, the lower court's decision appears to be directly inconsistent with the decisions of this Court in *Electronic Industries* and *SCRAP*. Moreover, given the succession of general rev-

enue cases, the question is necessarily a recurring one.[28] Finally, general revenue proceedings typically involve millions and even hundreds of millions of dollars of revenue on an annual basis; the $350 million in annual revenue involved in *Ex Parte No. 281,* including $10 million attributable to recyclables, is by no means unusual. Thus, the practical significance of a prompt and definitive determination of the issue by this Court is apparent.

2. The District Court determined that the ICC's elaborate environmental impact statement was invalid even though the court conceded that the statement met "the prescriptions of NEPA as to form." 371 F. Supp. at 1301. Its action raises at the outset a fundamental question on which the circuit courts are divided: whether NEPA intended to sanction judicial review, under some as yet undefined standards, of the *substantive merits* of the agency's impact statement determinations.

NEPA's impact statement procedure was designed to assure that the agency would take a careful look at the possible environmental consequences of its action and it was not intended to dictate the particular result to be reached by the agency.[29] Section 102(2)(C) provides that where the agency is reporting on a major federal

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[28] There have been general revenue proceedings since early in this century (*e.g., Ex Parte No. 74,* 58 I.C.C. 220 (1920)) but they have become much more frequent in recent years because of the railroads' financial condition and the accelerating increase in operating costs. Since 1960 such proceedings have been commenced almost every year.

[29] *Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275 (9th Cir. 1973); *Monroe County Conservation Council* v. *Volpe,* 472 F.2d 693 (2d Cir. 1972); *Committee To Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (D. Conn. 1972).

action for which an impact statement is required, it shall include "a detailed statement" on "the environmental impact of the proposed action" and related specific subjects of inquiry. It also directs that prior to issuing the statutory statement, the agency shall obtain the comments of other federal agencies which have jurisdiction or expertise relating to the environmental impact involved. *Id.*.

Here, the Commission's final impact statement certainly did constitute "a detailed statement" on the alleged environmental impact of the proposed action. In 150 pages of analysis, it addressed each of the related topics specified in the statute: whether there would be any unavoidable adverse environmental effects as a result of its action; alternatives to the proposed action; the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity; and the irreversible and irretrievable commitments of resources which would be involved in the proposed action were it implemented. And the final statement was issued only after the ICC received and reviewed comments on the draft statement obtained not only from other federal agencies, but also from the public at large including the appellees. See p. 10, above.

An examination of the lower court's criticisms of the impact statement shows that the court's basic quarrel was with the merits of the Commission's determinations. For example, it complains because the Commission chose to rely on one type of study rather than another. 371 F.Supp. at 1303. [30] It argues that the impact

[30] The court said, for instance, that "the statement does not offer any rigorous price sensitivity studies of its own" but "relies on general discussions of past scrap demand trends" and on "the

statement does not specifically respond to one or another of the many different points and studies considered in the voluminous proceeding. *Id.* It asserts inaccurately that the Commission limited itself exclusively to the environmental effects of the rate increase in question and failed to address the alleged underlying discrimination against recyclables in the existing freight rate structure. *Id.* at 1303-04.[31] In short, these attacks are directed at the Commission's consideration and evaluation of particular facts, the inferences the Commission has drawn, and the judgments it has made in the course of its careful examination of the environmental issues raised by its proposed action.

Other criticisms of the court, while phrased in more general terms, similarly comprise nothing more than disagreement with the Commission's substantive deter-

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concurrence of past scrap demand and rate increases." *Id.* at 1303. And the court indicated its preference for a "study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete." *Id.* at 1306.

[31] In fact, the Commission did consider these charges, and concluded that based on the underlying costs of transporting commodities, recyclables such as iron and steel scrap actually enjoy a preference as compared with the raw materials with which they supposedly compete and this preference would not only be maintained but widened by the selective increases involved in *Ex Parte No. 281.* See, *e.g.*, p. 12, n. 11 above. It was, moreover, entirely proper for the Commission to devote principal attention to the particular agency action under consideration—which involved the general increases on recyclables—since this is what NEPA's language clearly contemplates. Finally, the Commission has underway a broad proceeding denominated *Ex Parte No. 270* which is considering various aspects of the railroad freight rate structure including the basic rate structure so far as it may bear on environmental interests.

minations. For example, the court complains about the statement's "language and style" as reflecting the Commission's insensitivity to environmental values. It says that the ICC appears to find no merit in environmental arguments against the rate increase and adopts none of those arguments "as worthy of even partial acceptance." *Id.* And it takes the Commission to task for "failure to alter its draft impact statement" in response to the comments of other agencies and parties to the proceeding having special environmental interests. *Id.* Such assertions show that the District Court has not confined itself to enforcing the "procedural" requirements of NEPA but has thrust itself directly into the substantive decision-making properly confided to the agency.

Whether a court may pass upon the merits of an agency's impact statement determinations and substitute its judgment about their proper resolution is an open and disputed question. Judge Friendly, rejecting such attacks upon an ICC impact statement in *City of New York* v. *United States,* 344 F. Supp. 929 (E.D.N.Y. 1972), strongly suggested that NEPA, in light of its language and legislative history, contemplated little, if any, judicial review of the substantive policy judgments embodied in the impact statement. Similarly, in *National Helium Corp.* v. *Morton,* 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 42 U.S.L.W. 3632 (U.S. May 13, 1974), the Tenth Circuit held that review of an impact statement was limited to whether the agency made "an objective good faith effort to comply with the statutory procedural requirements" 486 F.2d at 1001. See also *Bradford Township* v. *Illinois State Toll Highway*

Authority, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972).[33]

Even if the courts are entitled to engage in substantive review of the merits of an impact statement, the District Court's action here could not be sustained. As its criticisms plainly show, the court engaged in *de novo* review and virtually substituted its own evaluation of the particular arguments and studies for those of the Commission. This approach could not be justified under any proper standard of judicial review.

As the courts have time and again emphasized, NEPA was simply intended to assure that the environmental effects of a proposed action are given adequate consideration by the decision maker, *e.g.*, *Cape Henry Bird Club* v. *Laird*, 359 F. Supp. 404 (W.D. Va.), *aff'd per curium*, 484 F.2d 453 (4th Cir. 1973); it was not intended to be a license for environmental groups or reviewing courts to substitute their judgment for that of the agency charged with the responsibility of evaluating the environmental impact of the action involved. By contrast the lower court's decision makes the validity of the agency's efforts depend on its ability to anticipate and refute every possible post hoc attack that can be leveled

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[33] To be sure, some opinions—most notably two opinions by the presiding judge below—take the view that these substantive determinations are open to review to a greater or lesser degree. See *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *SCRAP* v. *United States*, 371 F. Supp. 1291 (D.D.C. 1974). Indeed, Judge Breitenstein concurring in the Tenth Circuit's *National Helium* decision explicitly recognized the conflict between different circuits on the reviewability issue. 486 F.2d at 1006.

at it, rather than on an evaluation of its efforts construed in light of a rule of reason.[33]

Finally, even if the lower court did have some basis for overturning the ICC's impact statement, it certainly was not entitled to prescribe and dictate how the ICC should handle the case on remand. The decision patently usurps the agency's function by its detailed directions to the ICC specifying what arguments, evidence or procedures may or may not be utilized in the remanded proceeding.[34] Indeed, the court stops scarcely short of advising the ICC that it must reach a different result in the remanded proceeding.[35]

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[33] As one court has stated: "We are reminded of the suggestion of the district court in this case that '[i]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project. Further studies, evaluations and analyses by experts are almost certain to reveal inadequacies or deficiencies. But even such deficiencies and inadequacies, discovered after the fact, can be brought to the attention of the decision-makers, including, ultimately, the President and the Congress itself.' " *Environmental Defense Fund* v. *Corps of Engineers,* 470 F.2d 289, 297 (8th Cir. 1972). *cert. denied,* 412 U.S. 931 (1973). See also *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275, 1280, (9th Cir. 1973).

[34] The court advises the agency what types of analyses and studies it must make and include in its new impact statement (371 F. Supp. at 1302-03, 1306); it tells it what kind of arguments it may not ignore (*id.* at 1303-04); it determines the scope of the study including a direction to study in depth the underlying rate structure (*id.* at 1304-05); and it prescribes procedural steps that find no support whatever in NEPA itself (*id.* at 1306-07; see pp. 29-32, below).

[35] Quite apart from the tone of the decision, it appears to say specifically at two points that it is condemning the impact statement because it did not adopt at least some of the environmental arguments (371 F.Supp. at 1302) and some of the specific agency criticisms (*id.* at 1302-04).

The lower court's action in this regard not only confirms that it has substituted its own substantive views for those of the agency but represents independent legal error. It is a long established rule that the courts will not direct an administrative agency how to exercise the discretion reposed in it by Congress or dictate the content of the decision that the agency may make in the exercise of that discretion.[36] On judicial review the court's function is simply to lay bare any legal error committed by the agency (*FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)), and it is improper for the reviewing court to impose in its remand limitations on the way in which the agency shall exercise its judgment. *Id.; Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

Significant recurring issues are posed by the lower court's claim of authority to review the ICC's substantive determinations, by the standard of review applied by the court, and by the constraints applied to the ICC in the remanded proceeding. The issues are plainly of importance not only in defining the allocation of responsibility between court and agency under NEPA but also because of the practical consequences for the courts if they are to engage in the substantive review of the merits of the many environmental projects that are made the subject of impact statements each year.[37] It is thus of utmost importance that these issues be resolved as promptly as possible.

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[36] *United States ex rel. Chicago G. W. R.R.* v. *ICC*, 294 U.S. 50, 60 (1935); *ICC* v. *United States ex rel. Waste Merchants Ass'n*, 260 U.S. 32, 34 (1922); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *North Carolina Natural Gas Corp.* v. *United States*, 200 F.Supp. 745, 752 (D. Del. 1961).

[37] As of May 31, 1973, CEQ had received draft or final impact statements relating to 4,140 agency actions. 4th *CEQ Ann. Rep.* 242 (1973).

3. A substantial question is also raised by the District Court's determination that an impact statement must be prepared not only prior to the agency's *decision* in a general revenue proceeding but also prior to a hearing in the course of such proceeding even though no decision whatever is reached at the hearing stage. The lower court here relied on the ICC's failure to issue an impact statement prior to a "hearing" as a subsidiary "procedural" ground for invalidating the impact statement. 371 F.Supp. at 1300.[38] And it directed the ICC on remand to publish its impact statement prior to a "hearing" as well as prior to its ultimate decision. *Id.* at 1306-07.

The lower court's decision misconceives both the nature of a general revenue proceeding and the requirements of NEPA. General revenue proceedings are largely conducted through written testimony and all evidence is furnished directly to the full Commission itself. No tentative or recommended decision is made by an examiner or board at any intermediate stage: the ICC makes its own decision based upon the compiled evidence, briefs and oral argument.

Under the express language of NEPA the only environmental impact statement required is one that is to be "include[d]" in or with the agency's recommendation

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[38] The principal procedural point made by the court was that the ICC in preparing its impact statement did not "start over again" but merely reopened *Ex Parte No. 281* "for the limited purpose" of evaluating the environmental impact of the proposed increases through the impact statement procedure. *Id.* at 1299-1300. It is difficult to understand what the District Court finds objectionable on this score or how any prejudice can possibly have resulted from the ICC's action. Obviously, there was no reason for the ICC to revise its October 4 report unless and until its impact statement inquiry showed that the increases would have adverse environmental consequences.

or report. Section 102(2)(C). Since the same section provides that the impact statement shall "accompany" the proposal through the "agency review processes," it has been argued that the impact statement must be prepared at the first decision-making stage where two or more decisions are involved, so that it may inform that initial decision and be considered at subsequent stages of agency review. Here, however, the sole decision is that made by the full Commission and there is no basis whatever for requiring an impact statement at any earlier point.[39]

The lower court relied on two decisions which allegedly support the proposition that an impact statement must be prepared prior to any hearing that may be held in the course of an agency proceeding—the Second Circuit's decision in *Greene County* and Judge Wright's own decision in *Calvert Cliffs*.[40] The lower court overstates the holding of these cases in a highly significant way. Both of the decisions dealt with agency hearings which produced an examiner or hearing board report as an initial stage in the decision-making process (see 449 F.2d at 1118; 455 F.2d at 422); there was thus some arguable basis for their reliance upon Section 102(2)(C)'s requirement that the impact statement must "accompany the proposal through the

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[39] The agency must, of course, consult with and obtain comments from other federal agencies before making the impact statement. *Id.* One means of doing so, used by the ICC here, is to prepare a draft impact statement. But, again, there is no NEPA requirement that this be done at a specific point in time so long as it occurs before the final impact statement is issued.

[40] *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

existing agency review processes."[41] In a general revenue proceeding, however, hearings are not the forum for an "agency decision maker" (449 F.2d at 1114) nor do they culminate in "an initial decision." 455 F.2d at 422. The first and only *decision* is that of the Commission itself.[42]

The District Court not only engrafted a new and unsupported requirement onto the language of NEPA but it further complicated the ICC's already burdensome task. Virtually all commodities in the country are in issue in a general revenue proceeding which embraces literally thousands of individual rates. At present, even with expedited procedures and maximum use of written evidence and comments, the ICC often barely completes its single-stage proceeding within the seven-month suspension period.

The lower court, without any statutory sanction, would add an entirely new stage to the proceedings. It

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[41] See 449 F.2d at 1117; 455 F.2d at 421. For example, *Calvert Cliffs* stressed that the impact statement requirement focused upon "each agency decision maker" and that Congress intended the impact statement to be "considered" by the hearing board. 449 F.2d at 1114, 1118. *Greene County* summed up its decision by saying that an impact statement must be prepared before the examiner issued "his initial decision." 455 F.2d at 422.

[42] There are, of course, other important distinctions between the instant case and *Greene County* and *Calvert Cliffs*. Both of those cases involved serious procedural infirmities not present here. 455 F.2d at 421-22; 449 F.2d at 1117. In addition, each of them involved basic license-type grants; in the present case, by contrast, the ICC determinations do not resolve the justness and reasonableness of particular rates on particular movements, and any sufficiently interested party is entitled to file a complaint against such rates under Sections 8, 9, and 13 of the Act. In sum, neither the procedures employed nor the nature of the agency action resemble those at issue in the *Greene County* and *Calvert Cliffs* cases.

would require the ICC to assemble environmental information, to prepare a draft statement, to obtain comments upon it, and to prepare a revised impact statement before undertaking the quite similar fact-gathering process that it employs in reaching its decision on the merits. See 371 F. Supp. at 1306-07. No such unwieldy, pointless exercise can contribute either to the goals of NEPA or to the ICC's basic task of assuring a sound and efficient rail transportation system in the United States.[43]

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of the appeal.

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[43] The observation made in Mr. Justice White's separate opinion in *SCRAP* bears repeating in this context. The "failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." 412 U.S. at 724.